No. 3101.

# United States

# Circuit Court of Appeals,

## FOR THE NINTH CIRCUIT.

Harris and Stevens Corporation, a Corporation, and C. C. Harris,

*Appellants,*

*vs.*

Tarr & McComb, Incorporated, a Corporation,

*Appellee.*

## BRIEF FOR APPELLANTS.

CATES AND ROBINSON,
*Attorneys for Appellants.*

ALTON M. CATES,
Of Counsel.



Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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## STATEMENT.

On March 20, 1917, and for a long time prior thereto, the appellant Harris and Stevens Corporation was in the possession of and in the quiet and peaceable enjoyment and use of the real property described in the bill and situate in the county of Kern, state of California, under two different leases [Trans. pp. 17-24] and [Trans. pp. 24-33].

On July 24, 1915, appellant Harris and Stevens Corporation entered into an agreement with the appellee for the sale of all crude petroleum produced from said real property for a period of three years from said date, with the right and option by the appellee to extend the time for a further period of two years upon giving notice, for the sum of thirty cents per barrel, but the appellee did not agree to take and receive said production in the event that it should be unable to sell said production for thirty cents per barrel at or upon the property [Trans. pp. 33-38].

On October 4, 1916, for the purpose of securing the payment of moneys advanced and to be advanced to the appellant Harris and Stevens Corporation said appellant corporation assigned to said appellee said leases [Trans. pp. 39-42 and Trans. pp. 42-46].

Early in the year 1917 the appellants became indebted to sundry individuals, copartnerships and corporations in an amount aggregating about forty thousand dollars. On March 12, 1917, appellants, appellee and said creditors entered into an agreement by the terms of which provision was made for the payment of the claims of all creditors, including the claim of appellee as a creditor, together with interest thereon at seven per cent per annum [Trans. pp. 46-59]. The agreement further provided that in the event all of the creditors did not become parties thereto on or before March 20, 1917, it should become void.

All of the creditors, with the exception of three holding claims aggregating about three thousand dollars, joined in said agreement before March 20, 1917, and

upon the refusal of said three creditors to join in said agreement, and on March 21, 1917, upon the representation by the appellee to appellants that it would protect the interests of the appellants and the creditors who had signed said agreement, including itself, appellants surrendered possession of the real property and all personal property located thereon to the appellee.

Thereafter all of the creditors became parties to said agreement of March 12, 1917 [Trans. p. 13], and prior to the filing of the bill herein, all of said creditors received and receipted for a dividend to be applied upon the payment of their several claims [Trans. pp. 12-13].

The property described in the bill is all of the property of appellant Harris and Stevens Corporation and the property of said appellant C. C. Harris was heavily encumbered and appellants were without any money or property whatsoever, except as above stated.

At the time of the surrender of the possession of said property, the appellants had performed and carried out all of their obligations and agreements with the appellee and with the lessors in said leases. No consideration whatsoever was paid to appellants, or to either of them, by the appellee for the surrender of the possession of said property.

Before the commencement of this action appellants repeatedly demanded of appellee that it render them a just and true account of the expenses of operation of said property, which demand the appellee refused, and on or about the 29th day of June, 1917, appellants demanded the surrender to appellant Harris and

Stevens Corporation of the possession of said property, and demanded that appellee allow said property to be operated in accordance with the stipulations, agreements and conditions contained in said agreement of March 12, 1917 [Trans. pp. 46-59], between the appellants, the appellee and the creditors of appellants, which demand appellee refused.

### Motion to Dismiss.

The bill of complaint herein was filed July 16, 1917, and on August 4, 1917, appellants were served with motion to dismiss, upon the following grounds:

"1. Because it appears in the complaint filed in this cause that certain indispensable parties defendant, to-wit, some of the creditors of the plaintiffs as shown by Exhibit F, the trustee for said creditors and one of the lessors in the leases described, are citizens of the same state as the state in which the plaintiffs are citizens, and therefore no diversity of citizenship exists, as alleged and upon which basis the court is alleged to have jurisdiction.

"2. That it appears from the complaint filed in this cause that there is a misjoinder of parties plaintiff in that plaintiff C. C. Harris is not interested in the subject matter of the suit and is not entitled under the allegations of the complaint to any of the relief sought.

"3. That there is insufficiency of fact to constitute a valid cause of action in equity against the defendant.

"4. That there is a non-joinder of indispensable parties, to-wit, the creditors of plaintiffs, the trustees for said creditors plaintiffs and defendants, and the

lessors of the leases set out in the complaint." [Trans. pp. 59-60.]

On October 25, 1917, a decree dismissing the bill was entered.

## Specification of Errors.

There was no opinion filed by the court below on dismissing the bill of complaint; accordingly we must assume that the order dismissing the bill and the decree entered, were made upon all the grounds stated in appellee-defendant's motion to dismiss.

1. The court erred in dismissing the bill for want of jurisdiction.

2. The court erred in dismissing the bill upon the ground that no diversity of citizenship exists, for the reason that some of the creditors of plaintiffs-appellants, the trustee for said creditors, and one of the lessors are citizens of California, of which state plaintiffs-appellants are citizens.

3. The court erred in dismissing the bill upon the ground that there is a misjoinder of parties plaintiff-appellant in that plaintiff-appellant C. C. Harris is not interested in the subject matter of the suit.

4. The court erred in dismissing the bill on the ground that there is insufficiency of fact to constitute a valid cause of action in equity against the defendant-appellee.

5. The court erred in dismissing the bill on the ground that there is a misjoinder of indispensable parties in that the creditors of plaintiffs-appellants, the

trustee for the creditors and for plaintiffs-appellants and defendant-appellee, and the lessors in the leases set out in the bill of complaint are not made parties to the cause.

## POINTS AND AUTHORITIES.

### I.

### Indispensable Parties.

As to the question of who are indispensable parties, a full discussion of the subject is had in Barney v. Baltimore, 6 Wall 280, 18 Law Ed. 825, in which Mr. Justice Miller delivering the opinion of the court said:

> "This class (indispensable parties) cannot be better described than in the language of this court in Shields v. Barrow, 17 How. 130, in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' * * *
>
> "Nor does the act of February 28, 1839 (5 Stat. at L. 321), relieve the case of the difficulty. That act has been frequently construed in this court, and perhaps never more pertinently to the matter in hand than in the case already cited, of Shields v. Barrow.
>
> "The court there says, in relation to this act, that 'It does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction, and so far as it touches suits in

equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of Cameron v. McRoberts, 3 Wheat. 591; Osborn v. Bank of U. S., 9 Wheat. 738; and Harding v. Handy, 11 Wheat. 132. * * * The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court in Mallow v. Hinde, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court"; so that while this act removed any difficulty as to jurisdiction between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the cast last mentioned. * * * It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete, and final justice cannot be done between the parties to the suit without affecting those rights.' North Ind. R. R. Co. v. Mich. Cent. R. R. Co., 15 How. 233."

In the case at bar, the only relief sought is that the possession of the leased property be delivered by the appellee to Harris and Stevens Corporation, one of the appellants herein, and an accounting be had. No relief

is sought against the creditors, against the lessors nor against the trustee, and no attack is made upon the validity either of the leases or of the creditors' agreement of March 12, 1917.

The said agreement of March 12, 1917 [Trans. pp. 46-59], provides that the appellee herein shall purchase and pay for the production from the leased premises, that the expenses of operating the property shall be paid from the receipts from production, that twenty-two and one-half cents per barrel shall be retained by the appellee as marketing charges, and the balance shall be distributed by the trustee pro rata among the creditors. There is nothing in the agreement which deprives or attempts to deprive the appellant Harris and Stevens Corporation of the possession of the property, it being recited in the agreement that the defendant hold assignments of leases upon the property in question, and that upon payment in full of all the creditors, these assignments shall be cancelled and become void.

> "A party is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience. That is to say his presence as a party is indispensable where his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights. If the decree must be pursued against one, or if he must be active in its performance, his presence is indispensable. The rules in regard to parties generally are founded in part on artifi-

cial reasoning, partly in considerations of convenience, and partly in the solicitude of courts of equity to suppress multifarious litigation; but the rule as to indispensable parties is neither technical nor one of convenience; it goes absolutely to the jurisdiction, and without their presence the court can grant no relief. Thus, where the object of a bill is to divest a title to property, the presence of those holding or claiming such title is indispensable. The rescission of an agreement requires the presence of all claiming property through such agreement, and the impeachment of a judgment the presence of plaintiff in such judgment. Sometimes an interest less directly intervenes which the decree must necessarily affect, but in such case the holder of such interest is none the less indispensable."

16 Cyc. 189, 190.

The question as to whether "one of the lessors in the leases described" is an indispensable party is disposed of by the fact that where an assignment of a lease has once been made with the consent of the lessor, it being provided in the lease that such assignment cannot be made without his consent, the restriction against assignment is forever removed.

In this connection see:

Chipman v. Emeric, 5 Cal. 49.

II.

**The Appellant, C. C. Harris, Is Not Improperly Joined as a Party Plaintiff. He Has an Interest in the Subject Matter of the Suit and Is Entitled, Under the Allegations of the Bill, to the Relief Sought.**

The agreement of March 12, 1917 [Trans. pp. 46-59], specifically provides that it is made for the benefit of both appellants, and that from the proceeds arising from the production of oil from the leased premises the said appellant C. C. Harris shall receive, if sufficient moneys shall be realized, two hundred fifty dollars per month [Trans. p. 49].

III.

**The Bill of Complaint States a Cause of Action in Equity Against the Appellee.**

Counsel for appellee, in support of the contention that the bill does not state a cause of action in equity against the appellee, rely upon the case of

Dent v. Ferguson, 132 U. S. 50, 62.

In this case an agreement was made between the grantor, Ferguson, and the grantee, Dent, by which agreement there was reserved to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors of the grantor had a right of immediate appropriation to their debts, and which involved a secret trust for a return to the grantor of the property of which such creditors had the immediate right of sale. This agreement the court held would not be enforced and the parties must be left in the

position where they had placed themselves, although the grantee refused to perform his part of the fraudulent agreement with the grantor.

This case was decided upon the theory that the parties were *in pari delicto.*

**The Situation Here Is Entirely Different, and It Is Submitted That the Appellants Are Not in Pari Delicto With the Appellee.**

In Colby v. Title Insurance and Trust Company, 160 Cal. 632, at page 641, the court quotes with approval from 6 American and English Enc. of Law, page 416, as follows:

> "But when the parties do not stand *in pari delicto,* and it appears that the contract or deed was obtained by duress, equity will not refuse its aid. Thus when the inequality in the situation of the parties is such that it is apparent the act was not voluntary as where one of the parties exacts a security which the other is driven to give in order to save one dear to him from exposure, disgrace and ruin, equity will set aside the contract or deed so obtained."

The court also quotes with approval from 6 Cyc., page 316:

> "Although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet, if one of them acts under duress, or what the law regards as undue influence on the part of the other, they do not stand on an equal footing and the weaker one may be granted affirmative relief."

Admitting, for the purpose of this argument, that the appellants were *in delicto* when they surrendered the possession to the appellee of the property described in the bill, yet they were not *in pari delicto* with the appellee. All of the creditors, with the exception of three holding claims aggregating three thousand dollars, had signed and become parties to the creditors' agreement of March 12, 1917, and, as alleged in the bill, appellee agreed to protect these creditors, whom appellants desired to protect. Appellants also desired to protect the appellee in its rights, and under its representations that the creditors who had signed the agreement, including appellee, would be *protected,* appellants surrendered possession of the property to the appellee.

The apellants were in the position where they must repose the utmost trust and confidence in the appellee. Appellants, appellee and all the creditors of appellants, except the three dissenting creditors, had been engaged in an honest and fair endeavor to so arrange the financial affairs of appellants as to provide for the payment of all of appellants' debts and preserve their property. Appellants and appellee, by the terms of the so-called creditors' agreement of March 12, 1917 [Trans. pp. 46-59], had provided that, instead of appellants receiving only thirty cents per barrel for the crude oil produced from the leased premises, such production should be sold for the highest price obtainable and applied through the trustee to the liquidation of all appellants' indebtedness. Even a casual reading of said creditors' agreement must, we believe, carry the conviction that

appellants were acting in the utmost good faith and were endeavoring, by every means in their power, to do their bounden duty, i. e., pay every dollar they owed, together with interest. It cannot be that under all these circumstances it will be said that, even though appellants, in a moment of panic and fearing disaster to their plans to liquidate all their indebtedness, surrendered possession of the leased premises to the appellee, relying upon its promise to protect the creditors who had signed and become parties to said agreement, now after *all* the creditors have agreed to the plan of payment and have received dividends upon their claims [Trans. pp. 12-13], appellants shall be deprived of the possession of their property.

The creditors' agreement further provides:

> "It is further agreed that the assignments of said leases to Tarr and McComb, Incorporated, and executed October 4, 1916, shall be and remain in full force and effect, upon the express understanding between all parties hereto that said assignments shall inure to the benefit of all of said creditors. Upon payment of the claims of said creditors said Tarr and McComb, Incorporated, consents that said assignments of said leases shall be and become of no further effect and cancelled." [Trans. p. 51.]

Not only is there nothing contained in said creditors' agreement which even hints at a justification on the part of the appellee in holding *possession* of the leased premises, but, as will be seen by the above quotation, the agreement—and this is the agreement under which all parties are now operating [Trans. pp. 12-13]—

expressly provides that upon payment of the claims of the creditors the assignments of the leases upon the property shall be cancelled and appellant Harris and Stevens Corporation shall assume full control of the property, subject only to a continuing contract to sell the oil produced therefrom to the appellee, making certain division of the amount received [Trans. p. 49].

By reason of the surrender by appellants to the appellee of the possession of the property described in the bill of complaint, no creditor was preferred to another creditor, nor was any creditor induced to take any amount for his claim less than the full amount thereof, together with interest thereon at seven per cent per annum from the 12th day of March, 1917, until payment shall be made in full.

No one has been injured, no question of moral turpitude is involved and all the creditors will either be paid from the proceeds arising from the operation of the property or from the property itself, which is alleged in the bill to be of a value in excess of fifty thousand dollars, and the aggregate claims of creditors to have been not to exceed forty thousand dollars on March 12, 1917.

The true test as to whether relief will be granted is stated most clearly in

Starke v. Littlepage, 4 Rand (Va.) 368,

Where the court says:

> "The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in

equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transaction."

A debtor who, to delay or defraud his creditors, has transferred property, without consideration, to a participant in the fraud, may, on abandoning his fraudulent purpose and apprising the other party thereof, recover possession of the property in order to pay his creditors.

Carll v. Emery (Mass.), 1 L. R. A. 618.

In the case last above cited the court in the last two paragraphs of the opinion said:

"That a fraudulent transaction may be purged of the fraud by the subsequent action of the parties is well settled. Thus, if the checks transferred to the defendants had been fully paid for to the plaintiffs, and the sum had gone to the plaintiffs' creditors, the transaction would have been purged of fraud and the defendants would have had a good title thereto. Thomas v. Goodwin, 12 Mass. 140; Oriental Bank v. Haskins, *supra*."

"It would seem equally clear that when a party who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party who has been a participant in the fraudulent transaction by reason of such participation should be able to hold the property, the possession of which he had so acquired, and

thus prevent it from being devoted to its legitimate uses."

Badarocco v. Badarocco, 10 N. M. 767, 65 Pac. 153.

The bill alleges that the appellee did not pay the appellants any consideration whatever for the surrender of possession of said property.

**The Surrender of the Possession of the Property Described in the Bill Was Not in Fraud of Creditors, Because Whatever the Intent of the Appellants and Appellee May Have Been, No Creditor Has Been Injured.**

In order to avoid a conveyance on the ground that it was made in fraud of creditors, it must be shown that a creditor was injured by the conveyance.

Albertoli v. Branham, 80 Cal. 631;
Brown v. Campbell, 100 Cal. 635;
Wagner v. Law (Wash.), 15 L. R. A. 784.

"In order that a conveyance or transfer may be attacked as being fraudulent and void as against creditors, it is necessary, even where there is an actual fraudulent intent, that prejudice to the rights of creditors shall result therefrom, for fraud does not consist in mere intent not resulting in injury."

20 Cyc. 416, 417, and cases there cited.

"No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach. In other

words, to entitle a creditor to set aside a conveyance as fraudulent, it is necessary not only that there be fraud on the part of the vendor, participated in by the vendee, but also that there be an injury to the person complaining."

12 R. C. L. 491.

*The fact that there was a mental process to cheat, does not affect the transaction.*

Gunderman v. Gunnison, 39 Mich. 313.

**The Creditors of the Appellants Not Only Have Not Been Defrauded, but if the Act of Surrender of Possession of the Property Herein Was Fraudulent, It Is Now Purged of Fraud.**

"A fraudulent conveyance may also be rendered valid by the subsequent assent or confirmation of the creditors entitled to avoid the same, whether such assent or confirmation be expressed or implied from the receipt by them of the purchase money from the grantor or grantee, or proceeding against the grantee therefor, or from the receipt of the proceeds of a sale of the property or a dividend under an assignment or deed of trust."

20 Cyc. 416, and cases there cited.

"It requires no citation of authority to show that a creditor who assents, e. g., to an assignment by his debtor, containing a provision sufficient to avoid it as fraudulent, such as a trust for the debtor, is barred by his consent from raising objection afterwards to the assignment for any cause known to him when he assented."

Bigelow on Fraudulent Conveyances, p. 482.

Unless the appellants shall secure relief in equity, the very object sought to be accomplished by the creditors' agreement will be defeated, for the reason that the appellee, as one of the creditors, will have been allowed to obtain an unconscionable advantage to the ruin of the appellants; and the creditors, other than the defendant, have signed and become parties to the creditors' agreement upon a misrepresentation of fact, the representation in the creditors' agreement being that the appellants should have possession of and operate the property, that the creditors should be paid in full, together with seven (7%) per cent interest upon their claims, and that thereupon the assignments of said leases held by the appellee for the benefit of all the creditors should be cancelled and become of no effect; whereas, on the contrary, the appellee will have possession of the property and will have obtained an advantage not only of the appellants, but of all the other creditors, parties to said creditors' agreement, in that after the other creditors shall have had their claims paid in full, it will still be possessed of property of the value of more than fifty thousand dollars without having paid any consideration therefor.

**The Appellants Are Entitled to Recover Possession of the Property, the Subject of this Action, and Are Also Entitled to an Accounting.**

The rule in equity is well established that where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to the temptation of acting contrary

to that duty or bring *personal interest* in conflict with his duty. If he does so act, a court of equity will not inquire whether he has in fact violated his duty, but will grant relief irrespective of his good or bad faith, if the other party to the fiduciary relation desires it. This rule applies to every person who stands in such situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to which alone it will be applied.

10 R. C. L. 350;

Trice v. Comstock, 120 Fed. 620, 57 C. C. A. 656, 61 L. R. A. 176;

Boyd v. Blankman, 29 Cal. 19;

Ellicott v. Chamberlin, 38 N. J. Equity 604, 48 American Reports 327;

Schieffelin v. Stewart, 1 Johns Chancery (N. Y.) 620, 7 Am. Decs. 507, and note;

Gardner v. Ogden, 22 N. Y. 327, 78 Am. Decs. 192, and note.

Where a conveyance is made without any consideration and it appears from the circumstances that the grantee was not intended to take beneficially, equity will declare a resulting trust.

Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776.

The mere absence of a consideration for the surrender of the possession of the property described in the

complaint raises the presumption of fraud, imposition or undue influence.

Odell v. Moss, 130 Cal. 352, 358;
Hays v. Gloster, 88 Cal. 560, 566.

We respectfully submit that appellants are entitled to the relief sought by the bill and that the decree of the District Court should be reversed.

CATES AND ROBINSON,
*Attorneys for Appellants.*

ALTON M. CATES,
Of Counsel.